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**OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**November 20, 2008**

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In the Matter of David Glicksman

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Docket No. WET-2008-068  
File No. SE 49-609  
New Bedford

**RECOMMENDED FINAL DECISION**

This is an appeal of a Superseding Order of Conditions ("SOC") issued by the Department of Environmental Protection ("the Department" or "MassDEP") that conditionally allows the Applicant David Glickman to reinforce a rock wall and construct a stone revetment on his property within an Area Subject to Coastal Storm Flowage. The SOC affirmed the Order of the New Bedford Conservation Commission (the "NBCC").

The Petitioner submitted a Notice of Claim ("NOC") with allegations that fell into the following categories: (a) the wall will not serve a public purpose and will obstruct the public's view and use of the beach; (b) the wall enhancement will interfere with the property rights of the



owner and persons with an easement on the abutting property;(c) the fill allowed to be placed behind the wall will damage shellfish and shellfish harvesters.

The Applicant has moved to dismiss this appeal on multiple grounds, including failure to state a claim upon which relief can be granted and the Petitioner's lack of standing. The NBCC filed a Memorandum in Support of the Applicant's motion to dismiss. On October 27, 2008, the Petitioner filed an Opposition to the Motion to Dismiss which provided no facts or law, but only sought three weeks to respond to the Applicant's Motion. Thereafter, the Department filed a separate Motion to Dismiss for failure to state a claim and opposition to the time requested by the Petitioner to respond to the Applicant's motion to dismiss. It is over three weeks since the Petitioner filed his Opposition, but he has not filed any supplemental information. For the reasons set forth below, I recommend that the Respondents' motions be allowed and the Petitioner's appeal be dismissed.

#### **Failure to State A Claim On Which Relief Can Be Granted**

The work proposed by the Applicant is subject to the jurisdiction of the Wetlands Protection Act's ("the Act" or "M.G.L., c. 131, s. 40") and the implementing regulations at 310 CMR 10.00 only because it is proposed to take place in a Area Subject to Coastal Storm Flowage. The Petitioner's NOC (Paragraph F, 3(a)-(d)) alleges that the wall will encroach on abutting property allegedly owned by the City of New Bedford and interferes with easements held by other property owners in the area. The Petitioner alleges he has an interest in the abutting property. It is well established that claims of title or interference with property rights cannot be reviewed in the context of adjudicatory appeals. See, Tindley v DEQE, 20 Mass. App. Ct. 623, 627; 411 N.E.2d 189-190 (1980). Therefore, these property rights allegations regarding encroachment and

interference with access fail to state a cognizable claim in this forum.

The NOC also asserts that the wall will not serve a “public purpose” and would interfere with the public’s view or use of the beach (Paragraph F, (1) and (4)). There is nothing in the Act or implementing regulations that subjects work in a jurisdictional area to a public interest performance standard, or includes an interest in protecting the public’s view or use of the beach. Those claims may have some relevance in an appeal of a c. 91 license, approving work in Commonwealth tidelands, but not in the present proceeding. These allegations also fail to state a claim on which relief can be granted.

### **Lack of Aggrieved Party Standing**

The Wetland Regulations require that an individual in the Petitioner’s position be an aggrieved party to have the right to request an adjudicatory appeal, and also require him to set out in the notice of appeal sufficient written facts to demonstrate his aggrieved status (310 CMR 10.05 (7)(j)2.(a) and (b) iii.) A “person aggrieved” is defined in the Wetlands Regulations as “any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, s. 40.” 310 CMR 10.04.

Standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672, 322 N.E.2d 742, 748 (1975). Rather, it "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim." R.J.A. v. K.A. V, 34 Mass. App. Ct. 369, 373 n.8, 611 N.E.2d 729, 731 n.8 (1993). A petitioner must show that he or she will suffer a concrete injury peculiar to himself or herself caused by the project that is the subject of the appeal. Matter of Town of Plymouth, Docket No. 2000-091, Ruling on Department's Motion to Clarify Standing and to Dismiss for Lack of Standing, 8 DEPR 159 (August 9, 2001);

Matter of Town of Hanson, Docket No. 2000-81, Ruling on Motion to Dismiss for Lack of Standing, 8 DEPR 17 (January 1, 2001; compare Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 33-37 (2006)( plaintiff appealing zoning decision “[must] prove standing, which requires the plaintiff by direct facts and not speculative personal opinion—that his injury is special and different from the concerns of the rest of the community”). Typically, to show aggrievement, individual petitioners identify how or why a project will cause injury to their property. See, e.g., Matter of Town of Hull, Docket No. 88-22, Decision on Motion for Reconsideration, (July 19, 1988).

The Petitioner’s allegations regarding his status are only that he lives across the street from the Applicant and has an interest in the abutting land. The only viable claim upon which relief could potentially be granted is the one regarding damage to shellfish, since protection of this resource is an interest identified in the Act. Even assuming the bare allegations of harm to shellfish were assumed to be true, the Petitioner does not set forth any facts that indicate how that detriment could adversely affect him. Based on his representation that the sand fill will be detrimental to “those” who harvest shellfish (NOC Paragraph F, 5), I conclude that he is not a harvester, and therefore is not implicitly claiming any economic or other personal harm from the project’s alleged impact to the shellfish beds. There is no allegation that the project would impact property he owns or has an interest in.

It appears the Petitioner is only raising a general objection to the potential environmental impacts of the project, which is insufficient to demonstrate the personal harm that is essential to be considered an aggrieved person.

“[The petitioner] states only general concern for the environment and for the environmental harms [he] fears the project will cause...[he] must assert an injury from the project that is unique to her.... Because her claim of aggrievement is unrelated to any specific injury that she herself will suffer, she has failed to demonstrate any requisite

injury that would give her standing to bring this appeal as an aggrieved person.” In the Matter of Connolly Brothers Inc. Final Decision, 9 DEPR 158 (2002).

Therefore, I conclude that the Petitioner has failed to demonstrate his aggrieved party status in relation to the claim of potential detriment to shellfish, and lacks standing to assert this claim in this appeal.

### **Failure to Prosecute the Appeal**

The Petitioner’s Opposition to the motions to dismiss was not responsive in any manner to the grounds for dismissal detailed by the Respondents. Despite the Petitioner’s representation that he would file responsive, supplemental information within three weeks of the date the Opposition was filed, a timeline far in excess of the one week provided for in the Adjudicatory Rules ( 310 CMR 1.01(11)1., he has failed to meet even that deadline. A failure to file a timely response may result in the grant of relief requested by the moving party (310 CMR 1.01(11). In addition, the failure to respond to a motion is sufficient basis for a Presiding Officer to dismiss the appeal (310 CMR 1.01(10)(e)). I therefore conclude that the Petitioner’s failure to file a timely response to the Respondent’s motions to dismiss provides additional grounds upon which this appeal should be dismissed.

This final document copy is being provided to you electronically by the  
Department of Environmental Protection. A signed copy of this document  
is on file at the DEP office listed on the letterhead.

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Philip Weinberg  
Presiding Officer

### **NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be

appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.